

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
VOLUNTEER AND EXEMPT	:	
FIREMEN'S BENEVOLENT ASSOCIATION	:	DETERMINATION
OF FREEPORT, NEW YORK	:	DTA NO. 816208
for Redetermination of Exempt Organization Status	:	
under Articles 28 and 29 of the Tax Law.	:	

Petitioner, Volunteer and Exempt Firemen's Benevolent Association of Freeport, New York, P.O. Box 530, Freeport, New York 11520, filed a petition for redetermination of exempt organization status under Articles 28 and 29 of the Tax Law.

On May 18, 1998 and May 26, 1998, respectively, petitioner, by Donald R. Lohr, Esq., and the Division of Taxation, by Steven U. Teitelbaum, Esq. (Vera R. Johnson, Esq., of counsel), waived a hearing and agreed to submit this matter for determination based on documents and briefs submitted by September 18, 1998, which date began the six-month period for the issuance of this determination. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Peter T. Gumaer, Esq., of counsel) in its submission of documents and brief. After review of the evidence and arguments presented, Timothy J. Alston, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation properly denied petitioner's application for an exempt organization certificate.

FINDINGS OF FACT

1. Petitioner, Volunteer and Exempt Firemen's Benevolent Association of Freeport, New York, was created as a membership corporation by special act of the New York State Legislature on April 26, 1963 pursuant to Laws of 1963, (ch 819) ("charter"). Petitioner's charter sets forth its purposes as follows:

The purposes of such corporation shall be the maintenance of suitable headquarters for, and the promotion of fraternal intercourse among the members of such corporation, the relief, aid and assistance of such members and their families who are disabled or indigent, and the promotion of the welfare of the volunteer fire service within the Freeport village fire district and territory provided with fire protection by contract with such village fire district.
(L1963, ch 819, § 3.)

2. Petitioner's by-laws provide a list of petitioner's purposes which is similar in all respects to that contained in the charter except that the by-laws state that petitioner has been organized for the "relief, aid and assistance of *volunteer and exempt firemen who provide volunteer fire service within the Freeport village fire district and territory provided with fire protection by contract with such village fire district*, and their families who are disabled or indigent" (italics added).¹

3. Eligibility for membership in petitioner is restricted to the following persons:

All persons who are now or have been, or who hereafter shall be volunteer members of the Freeport village fire district, fire department, or of any fire corporation in such fire district, and all persons resident in such village fire district or in territory provided with fire protection by contract with such village fire district who are exempt volunteer firemen as defined by section two hundred of the general municipal law shall be eligible to membership in [petitioner]. (By-laws, Article 3, § 1.)

¹According to Article 8 of petitioner's by-laws, if there are any conflicts between the by-laws and the charter, the charter controls.

4. Persons who meet the eligibility requirements may become members of petitioner by completing an application for membership and paying an initiation fee of \$10. Petitioner also requires an annual dues payment of \$10 from its members. Failure to pay dues may result in expulsion. In addition, petitioner's by-laws state that a person eligible for membership who does not exercise that right within one year of becoming eligible shall be subject to an initiation fee equal to \$20 multiplied by the number of years such person has been a member of the Freeport fire department.

5. Pursuant to its charter, petitioner is the authorized recipient of its share of tax money collected pursuant to Insurance Law §§ 9104 and 9105 (former §§ 553 and 554), which impose a tax on fire insurance premiums for policies written by foreign and alien insurers. This "fire department tax" is distributed to petitioner by the Insurance Department. Petitioner's charter directs that such tax money "shall only be used for the care and relief of disabled or indigent volunteer and exempt volunteer firemen and their families" (L1963, ch 819, § 7).

6. The control and dispersal of fire department tax funds distributed to petitioner is granted under the charter and the by-laws to a board of trustees consisting of petitioner's president, vice president, secretary, treasurer and one other member having the title of trustee. Petitioner's by-laws require that such officers be members in good standing of petitioner for five consecutive years.

7. Petitioner requires prospective recipients of assistance to complete detailed applications in order to establish eligibility for such assistance. Applicants filing under disabled status must also submit a doctor's certification identifying the disability and the course of treatment. Applicants must also provide documentation to establish qualification for assistance. In accordance with the by-laws, members of petitioner's board of trustees investigate applicants for

assistance. Also in accordance with the by-laws, final decisions on assistance and relief are made by majority vote of the board.

8. Article 6 of petitioner's by-laws provides the following definitions "for the purposes of construction of the charter and by-laws of this association":

disabled - impaired, incapacitated, or unable, as a result of illness, disease, disorder, other pathological condition or injury, to discharge any normal physical or mental function, whether permanently or temporarily and whether totally or partially, and requiring therapeutic, corrective, rehabilitative or other prescribed treatment or the use of prescribed medication or device or devices.

indigent - characterized as lacking the economic means of subsistence or the necessities of life.

family - members of the immediate family, namely, members of the household who are supported in excess of 50% by the said volunteer or exempt fireman and are related by blood, adoption or marriage. (Italics added.)

9. The assistance and relief provided by petitioner consists of grants of money and provision of medical devices and equipment.

10. The annual membership meeting of petitioner is held in April of each year. Regular membership meetings are also held in January and October of each year.

11. The by-laws provide that regular meetings of the board of trustees are to be held monthly.

12. Petitioner submitted into evidence its statements of income and expenses for its fiscal years ended March 31, 1995 and March 31, 1996. The statements itemize income and expenses with respect to a "benevolent fund" and an "operating fund." For the year ended March 31, 1995, petitioner's statement indicates that petitioner's benevolent fund, which had a balance of \$699,697 as of April 1, 1994, had income totaling \$89,142, comprised of "New York State Fire Department Tax" of \$72,550 and interest of \$16,592. The statement indicates total

disbursements from the benevolent fund of \$105,110. This amount was comprised largely of “benefits to members” which totaled \$86,005. Other disbursements from the benevolent fund included meeting and office expenses (approximately \$10,000), accounting and legal fees (approximately \$2,800), officers’ pay (\$3,750), and optical plan (\$1,669). The statement further indicates that the benevolent fund balance as of March 31, 1995 was \$683,729.

13. Petitioner’s operating fund had a balance of \$5,425 as of April 1, 1994 and receipts, comprised of dues, totaling \$4,402. Disbursements from the operating account included meeting expenses (\$4,080) and office expenses (\$1,404) and totaled \$5,485. Petitioner’s operating fund balance at the close of the fiscal year ended March 31, 1994 was \$4,342.

14. For the year ended March 31, 1996, petitioner’s statement of income and expenses indicates that petitioner’s benevolent fund had a balance of \$758,716 “as of 1995”.² The benevolent fund had income of \$103,343 for this year which was comprised of \$78,798 in New York State Fire Department Tax and \$24,545 in interest. The benevolent fund had total disbursements of \$112,702. The largest disbursement item was benefits to members in the amount of \$76,773. Other disbursements from the benevolent fund were accounting and legal fees (\$25,496), meeting and office expenses (approximately \$6,000) and expense reimbursement (\$3,375). The income and expense statement indicates that the benevolent fund’s balance at the close of the fiscal year ended March 31, 1996 was \$749,357.

15. The 1996 statement of income and expenses indicates that the operating fund balance as of April 1, 1995 was \$4,342 and that the operating fund had receipts, consisting of dues, totaling \$5,169 during the year ended March 31, 1996. Disbursements from the operating fund

² There is no evidence in the record explaining the difference between the benevolent fund balance as of the close of the fiscal year ended March 31, 1995 (*see*, Finding of Fact “12”) and this figure.

during this year amounted to \$1,618. Such disbursements consisted of meeting and office expenses (approximately \$400), legal (\$350), members benefits (\$825) and bank service charge (\$46). The operating fund balance at the close of this fiscal year was \$7,893.

16. Benevolent fund disbursements designated “benefits to members” represent fire department tax monies paid to indigent or disabled volunteer firemen and their families.

17. Petitioner also submitted statements of financial condition for the fiscal years ended March 31, 1995 and 1996. These statements indicate that the benevolent fund balance was held in several bank accounts and certificates of deposit, an annuity and a government fund.

18. Petitioner also submitted copies of its newsletter dated October 1996, January 1997, and April 1997. Each of these newsletters gives notice to members of the next meeting of the association. The newsletters submitted also give notice of proposed changes in the by-laws, and upcoming events in the association, such as the induction of life members.³ The newsletter also brings members up to date on the health of members and retired members, injuries suffered by members fighting fires, deaths of members, and greetings from and updates on the lives of retired members. The October 1996 newsletter asks members to inform the association and the board of personal matters which may be of interest to the board such as weddings, births of children, illness, hospitalizations or accidents.

19. The newsletters also apprise members of other activities of the association. Specifically, the October 1996 newsletter refers to petitioner’s snow removal program whereby members clear snow from the walks of elderly and disabled members. The newsletter

³ Petitioner’s by-laws define a life member as any member attaining 68 years of age.

encouraged members to help with this program. The January and April 1997 newsletters provide information regarding petitioner's vision care plan.

20. Petitioner has been granted an exemption from Federal income tax by the Internal Revenue Service under section 501(c)(4) of the Internal Revenue Code as a social welfare organization.

21. Petitioner filed an Application for an Exempt Organization Certificate (Form ST-119.2) dated September 9, 1996. Petitioner claimed exempt status on its application under Tax Law § 1116(a)(4) as a charitable organization.

22. Petitioner subsequently submitted additional documentation in support of its application in response to a Division of Taxation ("Division") request. A letter to petitioner dated May 27, 1997 from the Division's Exempt Organizations Unit stated:

The Tax Law exempts New York State governmental entities, such as your organization, from the payment of sales and use taxes on their purchases.

Tax exemption numbers are not issued to governmental entities. In order to make tax free purchases, your organization must present vendors with its official purchase order. You may present a copy of this letter along with your purchase order to any vendor who requests a tax exemption number or an Exempt Organization Certification, Form ST-119.1.

NOTICE TO VENDORS

This letter is not an exemption document. You are not required to collect tax from the above organization, if they present you with their governmental purchase order. **A governmental purchase order is the only evidence you need to substantiate an exempt sale to a governmental purchaser.** (Emphasis in original.)

23. The Division offered no explanation for the May 27, 1997 letter.

24. By letter dated August 5, 1997 and addressed to petitioner's representative, the Division denied petitioner's application. The Division's letter of denial indicated its position that

petitioner was neither organized nor operated exclusively for charitable purposes. Specifically, the denial letter stated that petitioner failed to meet the “organizational test” because:

1. The stated purposes specified in section 3 of Chapter 819 of your client’s Certificate of Incorporation [sic] are not exclusively charitable within the . . . definition of that term [as set forth in the Division’s regulations] as the purposes of your client’s organization are for “the promotion of fraternal intercourse among the members of such corporation, the relief, aid and assistance of such members and their families who are disabled or indigent, and the promotion of the welfare of the volunteer fire service within the Freeport village fire district and territory provided with fire protection by contract with such village fire district.
2. Your Certificate of Incorporation fails to dedicate the assets of the corporation to an exempt purpose, upon dissolution.

Regarding the “operational test,” the denial letter stated:

Your client’s organization does not meet the operational test for exemption. The information presented discloses that, although some of the corporation’s activities may be charitable in nature, it is primarily operated to provide assistance and relief benefits to its members. This serves a private rather than a public charitable purpose. As a result, the net earnings of the corporation inure to the benefit of members/private individuals which is prohibited under the statute.

Further, the Federal information available to this office shows that your client’s corporation has received exemption from Federal income tax under section 501(c)(4) of the Internal Revenue Code, as a social welfare organization, rather than under section 501(c)(3), as a charitable organization, which is identical to the Sales Tax Law.

CONCLUSIONS OF LAW

A. Tax Law § 1116(a)(4) provides tax exempt status to an organization for sales and use tax purposes if it is “organized and operated *exclusively*” for an exempt purpose (emphasis added). Charitable purposes are among the exempt purposes listed in section 1116(a)(4). As noted previously, petitioner’s application for exemption claimed exempt status as a charitable organization.

B. “Charitable” includes “relief of the poor, distressed or underprivileged; . . . lessening the burdens of government; and promotion of social welfare by organizations designed to accomplish any of the above purposes” (20 NYCRR 529.7[e][1][ii]).

C. Statutes and regulations authorizing exemptions from taxation, such as Tax Law § 1116(a)(4), are to be strictly and narrowly construed (*see, International Bar Association v. Tax Appeals Tribunal*, 210 AD2d 819, 620 NYS2d 582, 583, *lv denied* 85 NY2d 806, 627 NYS2d 323). To establish entitlement to exempt organization status, petitioner was required to meet both an organizational and an operational test (*see*, 20 NYCRR 529.7[b][2]).

D. The organizational test relates solely to the provisions of the organizing documents (20 NYCRR 529.7[c][1]). The regulations provide that:

An organization is organized exclusively for one or more exempt purposes only if its organizing documents:

(a) limit the purposes of such organization to one or more exempt purposes; and

(b) do not expressly empower the organization to participate, other than as an insubstantial part of its activities, in activities which in themselves are not in furtherance of one or more exempt purposes (20 NYCRR 529.7[c][1][i]).

The regulations further provide that:

In no case will an organization be considered to be organized exclusively for one or more exempt purposes, if, by the terms of its organizing documents, the purposes for which such organization is created are broader than the purposes specified in section 1116(a)(4) of the Tax Law (20 NYCRR 529.7[c][1][ii]).

Moreover, even if the terms of the organizing documents state that an organization is created for a purpose no broader than those specified in section 1116(a)(4), it nonetheless is not organized exclusively for one or more exempt purposes if its organizing documents

“empower it to carry on, otherwise than as an insubstantial part of its activities, activities which are not in furtherance of one or more exempt purposes” (20 NYCRR 529.7[c][1][iii]).

The organizational test also requires that the assets of the organization be dedicated to an exempt purpose upon dissolution. Specifically, the regulation states:

An organization is not organized exclusively for one or more exempt purposes unless its assets are dedicated to an exempt purpose. An organization's assets will be considered dedicated to an exempt purpose if, upon dissolution such assets would, by reason of a provision in the organization's organizing documents or by operation of law, be distributed for one or more exempt purposes, or to the Federal or a state government or to a local government, for a public purpose. An organization does not meet the organizational test if, by operation of law or through the provisions of its organizing documents, the organization's assets could, upon dissolution, be distributed to its members or shareholders or for a nonexempt purpose. (20 NYCRR 529.7[c][3].)

E. Petitioner has failed to show that it meets the organizational test. The Division therefore properly denied petitioner’s application for exempt organization status.

Petitioner's charter and by-laws list several purposes for which petitioner was formed (*see*, Findings of Fact “1” and “2”). Petitioner has established that its “relief, aid and assistance” purpose is an exempt charitable purpose. Pursuant to this purpose, fire department tax funds received by petitioner are dispersed to indigent and disabled volunteer firemen. Contrary to the Division’s assertion, the recipient class of petitioner’s assistance is not limited to petitioner’s members. Rather, the record shows that the recipient class of such assistance is volunteer and exempt firemen who provide volunteer fire service within the Freeport village

fire district.⁴ “Charitable exemptions are justified on the basis that the exempt entity confers a public benefit - a benefit which the society or the community may not itself choose or be able to provide, or which supplements and advances the work of public institutions already supported by tax revenues” (*Bob Jones Univ. v. United States*, 461 US 574, 591; 76 L Ed 2d 157, 173).⁵ That petitioner’s relief, aid and assistance purpose provides a public benefit may be seen in the fact that it is publicly funded through a tax imposed on fire insurers. The Legislature has thus recognized this purpose as a legitimate function of government.

The other purposes listed in petitioner’s charter and by-laws are “the maintenance of suitable headquarters for, and the promotion of fraternal intercourse among the members of [petitioner]” and “the promotion of the welfare of the volunteer fire service within the Freeport fire district.” These purposes do not appear on their face to be charitable within the meaning of the regulation. In particular, “the promotion of fraternal intercourse among the members of [petitioner]” appears, on its face, to authorize social activities. Such activities would clearly fall outside the meaning of charitable as defined in the regulations and would appear to confer no public benefit. Indeed, although petitioner is restricted by its charter and by-laws with respect to the distribution of fire insurance tax money received, there do not

⁴Specifically, notwithstanding section 3 of the charter, which appears to restrict “relief, aid and assistance” to members and their families (*see*, Finding of Fact “1”), section 7 of the charter directs that fire department tax money received by petitioner “shall only be used for . . . volunteer and exempt volunteer firemen and their families” (*see*, Finding of Fact “5”). The by-laws also state that relief, aid and assistance are to be provided to the larger class of volunteer and exempt firemen who provide volunteer fire services within the Freeport village fire district. Moreover, as petitioner correctly notes in its brief, court decisions addressing benefit eligibility for benevolent funds similar to the one at issue, have held that eligible recipients of such benefits include all volunteer firemen who provide services in the district and may not be restricted to members of the benevolent association (*see, Uniformed Fire Officers Association v. Mutual Aid Association* 82 AD2d 916, 440 NYS2d 706; *see also, Bruno v. Walder* 82 AD2d 903, 440 NYS2d 703).

⁵It is appropriate to look to Federal law for guidance because Tax Law § 1116(a)(4) is similar to Internal Revenue Code § 501(c)(3) (*see, Matter of Great Neck-Port Washington, New York Lodge No. 1543, BPO Elks*, Tax Appeals Tribunal, September 5, 1991).

appear to be any restrictions in petitioner's organizing documents preventing petitioner from engaging in any activity so long as it is deemed to fall within any of these three remaining purposes. Furthermore, neither petitioner's application for exemption, its brief nor its reply brief offers any specific explanation or definition of these purposes. Petitioner has thus failed to show that these three purposes were exempt or, if not in furtherance of an exempt purpose, petitioner has failed to show that it was authorized to engage in these activities other than as an insubstantial part of its overall activities (*see*, 20 NYCRR 529.7[c][1][i]).

Petitioner has also failed to show that its assets are dedicated to an exempt purpose. Neither petitioner's charter nor its by-laws contain any provision regarding the distribution of petitioner's assets upon dissolution. Petitioner argues, however, that it is subject to the provisions of the Not-For-Profit Corporations Law regarding dissolutions, which provide, generally, that upon court approval, the assets of a corporation shall be distributed to an organization or organizations engaged in activities substantially similar to those of the dissolved corporation as approved by the court (*see*, Not-For-Profit Corporation Law § 1005). Accordingly, petitioner asserts that the distribution of its assets upon dissolution is properly dedicated to an exempt purpose because, by operation of law, its assets are distributed to an organization engaged in activities substantially similar to petitioner. This contention is rejected. Petitioner correctly notes that the failure to include a dissolution provision in an organization's organizing documents is not necessarily fatal to meeting this component of the organizational test because the regulations specifically allow the dissolution requirement to be met "by operation of law" (*see*, 20 NYCRR 529.7[c][3]). What is fatal to petitioner's claim, however, is that the inclusion of nonexempt purposes in petitioner's charter and by-laws as discussed above necessarily means that the distribution of petitioner's assets upon dissolution,

by operation of law, may be distributed to an organization authorized to engage in similar nonexempt activities. Petitioner thus failed to meet the dissolution requirement.

F. The operational test relates to the organization's activities (20 NYCRR 529.7[d][1]). The Division's regulations provide that an organization will be considered as "operated exclusively" for one or more exempt purposes "*only if almost all of its activities* accomplish one or more exempt purposes specified in section 1116(a)(4) . . ." (20 NYCRR 529.7[d][2]; emphasis added). The regulation further provides that an organization will *not* be regarded as "operated exclusively" if "more than an insubstantial part of its activities is not in furtherance of an exempt purpose" (*id.*).

G. Petitioner has failed to meet the operational test. Consistent with the discussion in Conclusion of Law "E", petitioner's activities in connection with its relief, aid and assistance purpose are in furtherance of an exempt purpose. Petitioner has failed to show, however, that "almost all of its activities" were in furtherance of this purpose. Petitioner submitted statements of its income and expenses (*see*, Findings of Fact "12" through "15"). Except for the benevolent fund amounts designated "benefits to members" (*see*, Finding of Fact "16"), however, petitioner has not shown that any of its disbursements were in furtherance of an exempt purpose. Petitioner submitted no evidence to explain any such expenditures. Petitioner's statement of income and expenses for the year ended March 31, 1995 indicates that petitioner paid \$86,005 in benefits to members. Petitioner's total disbursements for that same year (including both the benevolent fund and the operating fund) were \$110,595. Accordingly, about 22% of petitioner's expenses for that year were attributable to nonexempt activities. For the year ended March 31, 1996, petitioner's statement of income and expenses indicates that petitioner paid \$76,773 in benefits to members from its benevolent fund. Its

total benevolent fund and operating fund expenses for that year were \$114,320. Accordingly, about 33% of petitioner's expenses for that year were incurred in connection with nonexempt activities. Based on petitioner's statements of income and expenditures, therefore, it appears that "more than an insubstantial part" of petitioner's activities "were not in furtherance of an exempt purpose" (20 NYCRR 529.7[d][2]).

H. Petitioner also asserts that the May 27, 1997 letter from the Division granted it tax exempt status as a governmental entity (*see*, Finding of Fact "22") and that no new or additional documentation was submitted between the date of that letter and the Division's letter denying petitioner's exempt organization application dated August 5, 1997. With respect to this assertion, the May 27, 1997 letter clearly did not grant petitioner's application for exempt organization status. Indeed, the letter did not refer to petitioner's application and mistakenly referred to petitioner as a governmental entity. Furthermore, there is no indication in the record that petitioner relied on the May 27, 1997 letter to its detriment. Accordingly, while an explanation from the Division regarding the May 27, 1997 letter would have made for a more complete record, the letter itself is not relevant to the matter at issue.

I. The petition of the Volunteer and Exempt Firemen's Benevolent Association of Freeport, New York is denied and the Division of Taxation's denial of petitioner's Application for an Exempt Organization Certificate is sustained.

DATED: Troy, New York
March 4, 1999

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE